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Inflexible Leave Policy Not Necessarily Illegal

Grace Hwang was an assistant professor, working on a contract that was renewed each year, at Kansas State University. (KSU) She signed a contract to teach classes over the next three academic terms (fall, spring and summer). However, before the fall semester began, she was diagnosed with cancer and needed treatment.

Hwang, pursuant to KSU policy, applied for and received a six-month paid leave of absence. But when her leave was almost over, her doctor told her she should take more time off. She asked for another leave, through the spring semester, promising she would return for the summer semester. KSU refused, saying that she had exhausted the leave for which she was eligible. She sued, alleging that KSU violated the federal Rehabilitation Act by not providing her a reasonable accommodation in the form of extended leave. (The Rehabilitation Act is similar to the Americans with Disabilities Act and applies only to recipients of federal money.)

She lost her case. The Court said there is no question that Hwang is a capable teacher and there's no question that she has a disability. But, she was not able to perform the essential functions of her job. The Court said that "It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions - and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations - typically things like adding ramps or allowing more flexible working hours - are all about enabling employees to work, not to not work."

Hwang argued that the Equal Employment Opportunity Commission (EEOC) has said that employers may be required to provide additional unpaid leave as a reasonable accommodation. But the Court noted that the EEOC has also said that six months of leave "is beyond a reasonable amount of time."

Hwang noted that KSU allows some employees to take off up to a year for sabbaticals, and thus argued that extending her leave would not be unreasonable. But the Court noted that she did not show that she, a year-to-year contractual employee, was entitled to sabbaticals. Employers have to treat similarly-situated employees similarly, but may treat tenured employees differently from contractual employees. Hwang also argued that KSU retaliated against her by not hiring her for another position, but she did not show that she was the best qualified applicant or that the people reviewing her application knew of her disability.

The case is Hwang v. Kansas State University, 2014 WL 2212071 (10th Cir. 2014).

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Reasonable Accommodations Extend to Drug Tests

Laura Jones interviewed for a job with Walmart. The interview went well, and the store offered her a job, contingent upon her passing a urinalysis test for illegal drugs. Ms. Jones let Walmart know that she could not produce urine because she has end-stage urine disease. The interviewer told her to ask the drug-testing company about alternate tests that would serve the same purpose.

Ms. Jones went to the drug testing facility and found out they could test her for drugs with a mouth swab/saliva test, but only if Walmart ordered the test. She told the interviewer about the mouth swab test and offered to pay for it if the store would order it for her. The interviewer said that she had called "the corporate office" and was told that Jones could not be hired unless she passed a urinalysis test. The store closed her application file for failing to take the test.

Jones filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC), alleging that the store failed to provide a reasonable accommodation for her disability by allowing her to take an alternative test. The EEOC is now suing Walmart.

Debra M. Lawrence, Philadelphia regional attorney, said, "While an employer may require applicants to undergo a drug test, these lawsuits should send a strong message to all employers that they simply cannot have a blanket, inflexible policy or practice of requiring only a urinalysis test, regardless of the circumstances. Paying attention to federal disability law and making a minimal effort to accommodate this applicant would have saved everyone a lot of trouble." She said this is the third lawsuit the EEOC filed in the last year against employers who refused to provide alternative drug tests, such as a saliva test or a blood test, to applicants who requested and needed that reasonable accommodation.

Spencer H. Lewis, Jr., EEOC Philadelphia district director, added, "Walmart evidently thought Ms. Jones was qualified for the position because it made her a job offer. When it refused to permit her to take an alternate drug screening test and revoked the job offer, the company lost the talent and services of a qualified employee as well as violated federal law."

The BHRC had a similar case in 2011 and was able to reach a settlement satisfactory to all parties.

Rite Aid of Michigan Settles ADA Claim

The U.S. Department of Justice (DOJ) found that a Rite Aid pharmacist in Michigan discriminated against a customer with HIV by refusing to administer a flu shot to the customer. The pharmacist had access to surgical gloves, but told the customer that she needed "special gloves" to administer a flu shot to him, and that he should come back for his shot after she had ordered the gloves.

The customer filed a complaint alleging discrimination in public accommodations on the basis of disability in violation of the Americans with Disabilities Act (ADA), and the DOJ recently announced a settlement. Rite Aid will pay the customer $10,000 and will pay the government $5000. In addition, Rite Aid must train its staff on the requirements of the ADA and must implement an anti-discrimination policy.

In announcing the settlement, Jocelyn Samuels, Acting Assistant Attorney General, said "Erecting unfair and discriminatory barriers to medical care for people with HIV is unacceptable. The ADA prohibits these types of barriers, and the Justice Department will fight to tear them down."

If you have questions about the ADA, please call the BHRC, or go to www.ada.gov.

Court Rules in Favor of Employee Who Walked Off Job

David Hotchkiss began working for O'Reilly Auto Parts in Washington State in 2004. He was transferred from the Seattle store to the Spokane store in 2010.

Shortly after Hotchkiss' transfer, one of his subordinates, Kevin Hulme, began making disparaging comments about his sexual orientation. When Hotchkiss called Hulme, Hulme said that Hotchkiss "sounded like a queer on the phone." At least once when they were working together, Hulme called his boss a "queer" and a "faggot."

Hotchkiss reported these comments to his supervisor, who said he would handle it. About a week later, Hotchkiss told another supervisor that a "friend" of his was being harassed at work and asked how his "friend" should handle the situation. At the end of the conversation, this supervisor allegedly said, "All faggots should be shot." Later that day, allegedly fearing for his safety, Hotchkiss walked off the job.

Three days later, Hotchkiss called his supervisor, explained why he had quit and asked if he could be transferred back to Seattle. He was told to reapply. He also called his former supervisors at Seattle, who said they would be glad to have him back, but he would need to talk to HR. He did and was told he would have to reapply. He filed a complaint alleging discrimination with the Washington State Human Rights commission. The matter eventually landed in court.

O'Reilly argued that four "isolated comments" were not enough to create a hostile working environment as the law defines the term. The Court disagreed. The alleged comments occurred fairly close together and escalated in severity.

The store did investigate Hotchkiss' original complaint, and did tell Hulme to stop his behavior, but it never told Hotchkiss this. He was, as the Court said, "left to wonder what, if any remedial action had been taken on his complaint." When, a few days later, a supervisor allegedly said, "All faggots should be shot," he concluded with some reason that no one at the store had his back. The Court said it was likely reasonable that he chose to walk out instead of filing another complaint, given that he had no way of knowing if the store did anything about his first complaint.

The Court said there was sufficient evidence for a jury to consider. The case is Hotchkiss v. CSK Auto Inc., d/b/a O'Reilly Auto Parts, 2013 WL 22819 (E.D. Washington 2013).

HUD Announces Settlement in Familial Status Discrimination

It is generally illegal for housing providers to discriminate against applicants because they have children. Such discrimination is called familial status discrimination, and is prohibited by local, state and federal law.

Allpoints Realty is a housing provider in Connecticut. It placed internet ads and listings that said that no children were allowed in condos in Plainville, CT. When the Connecticut Fair Housing Center sent testers posing as potential buyers to the condos, they were told that no families with children were allowed at this location.

Some housing may qualify as "housing for older persons," and in those cases, it is legal to prohibit children. But that was not the status of these condos.

The Connecticut Fair Housing Center filed a complaint with Housing and Urban Development (HUD), and that complaint was recently settled. Under the terms of the settlement, Allpoints will pay damages of $24,375, will train its employees about fair housing and will inform all condo owners that they may not refuse to rent or sell to people because they have children.

Medicare Will Now Cover Gender Reassignment Surgery

In 1981, Medicare implemented a ban on covering gender reassignment surgery, basing its decision on the finding that such surgery was considered experimental. But now, as a result of a lawsuit filed by a transgender woman and army veteran, it will begin covering these procedures.

The Department of Health and Human Services Board found in May that medical studies published since 1981 showed that the grounds for exclusion of this coverage are "not reasonable" anymore and lifted the ban. Judith Bradford, co-chair of Fenway Institute, a Boston-based research center that focuses on LGBT (lesbian, gay, bisexual and transgender) health, said, "This is long overdue. It brings government policy in line with the science around transpeople's health care needs."

In contrast, Leanna Baumer, a senior legislative assistant with the Family Research Council, said the ruling "ignores the complexity of issues surrounding gender identity issues." She said, "Real compassion for those struggling with a gender identity disorder is to offer mental health treatments that help men and women become comfortable with their actual biological sex - not to advocate for costly and controversial surgeries subsidized by taxpayers."

Jennifer Levi, an attorney who worked on the case, said that "For someone who can't get treatment [for gender dysphoria], the impact can be devastating." She said they may be depressed, have serious problems with self-esteem and have difficulty forming relationships.

The Medicare ruling is not setting a ground-breaking precedent. Five states have affirmed that transition care for transgender individuals should be considered an essential part of medical coverage, as has Washington, D.C. In 2002, no Fortune 500 companies offered transgender benefits. In 2012, 19% did and by 2014, 28 percent did.

(Article based on "Ban lifted on Medicare coverage for sex change surgery," by Ariana Eunjung Cha, published May 30, 2014 in the Washington Post.)

Members and friends of the BHRC marched in the 4th of July parade, distributing 1500 diversity books.